

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

AMY BRITTON

Claimant,

and

BECK OIL CO OF ILLINOIS

Employer.

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HEARING NUMBER: 08B-UI-03436

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.4-3

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Amy Britton, worked for Beck Oil Co. of Illinois from March 21, 2005 as a full-time cashier, and later promoted to an assistant manager. (Tr. 3, 6) On or about January 21, 2008, the claimant presented the employer with medical restrictions she incurred as a result of her pregnancy. (Tr. 3) There was only one restriction, i.e., no lifting more than ten pounds. (Employer's Exhibit 1)

A couple of months later, the employer received another doctor's note dated March 7, 2008 on March 11, 2008 that indicated Ms. Britton was prohibited her from "... lifting, vacuuming or mopping..." In addition, she was restricted from "... mop[ping]... climbing ladders and toxic fumes" for the duration of her pregnancy. (Tr. 4, 6-7) The claimant was allowed to work on Sundays because that was the day

she

would do her paperwork. Ms. Britton finished working the remaining days of that week. She sought medical attention from her physician on March 13th to clarify her previous restrictions. (Tr. 8) At that point, the employer laid her off until she could obtain a full medical release as she was no longer able to perform the routine functions of her job. (Tr. 4, 6)

Ms. Britton is able to work the cash register and perform paperwork without restrictions. The employer even called her back to work in mid-April "... to run the cash register and do the snack counter and keep coffee made and remove the trash from the snack counter..." (Tr. 9)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.4.3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:

The individual is able to work, is available for work, and is earnestly and actively seeking work....

In addition, the law also provides that a person "... must be physically able and available for work, not necessarily in the individual's customary occupation, but in some *reasonably suitable, comparable, gainful, full-time endeavor...* that is generally available in the labor market..." (Emphasis added.) See, 871 IAC 24.22(1)" b."

The record establishes that while Ms. Britton may not be able to work in her full capacity as a cashier and assistant manager, she has established by her unrefuted testimony that she can still be attached to the labor force, which is what determines whether or not she is able and available for work. The employer does not question that she can perform other duties, which is evidenced by her unrefuted testimony that she was released with a 10-pound weight restriction, and yet was recalled to work on the cash register in April. The employer does not deny that she also performed other light duties, which is indicative that Ms. Britton is able and available for work. There are other cashier positions that would not require a ten-pound or more lifting restriction.

Even though the employer need not accommodate the claimant if the 'injury' is nonwork-related, the burden of proof is on the claimant to establish that she is able and available for work. The court in Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa 1991) held that a claimant who does not show the ability to perform any work, not just the work of the claimant's former profession, is not able and available. Here, Ms. Britton has satisfied her burden of proof.

DECISION:

The administrative law judge's decision dated April 25, 2008 is **REVERSED**. The claimant has established she is able and available for work. Accordingly, she is allowed benefits provided she is otherwise eligible.

Elizabeth L. Seiser

John A. Peno

AMG/fnv

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv